Citation: R. v. Grant (M.E.), 2013 MBCA 95Date: 20131030

Docket: AR 11-30-07585

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Mr. Justice Michel A. Monnin
Madam Justice Barbara M. Hamilton

B E T W E E N :

	)	***S. B. Simmonds,***
HER MAJESTY THE QUEEN	)	***V. L. Gama*** *and*
	)	***D. G. Tan***
Respondent	)	*for the Appellant*
	)	
	)	***E. A. Thomson*** *and*
- and -	)	***A. Y. Kotler***
	)	*for the Respondent*
	)	
MARK EDWARD GRANT	)	*Appeal heard:*
	)	***April 16*** *and* ***17, 2013***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***October 30, 2013***

MONNIN J.A.

[1] This is an appeal from a conviction for second degree murder following a trial before a judge and jury. The accused also seeks to appeal his sentence of life imprisonment without eligibility for parole for the maximum period of 25 years.

Introduction

[2] Candace Derksen, a 13-year-old school girl, went missing on November 30, 1984. She left her school in the afternoon of that date, presumably on her way back home, but was never seen alive again.

[3] Her body was discovered on January 17, 1985, hogtied and frozen in a shed in an industrial yard. She had died of hypothermia as a result of exposure.

[4] The accused was arrested on May 16, 2007, and charged with first degree murder on the basis of newly obtained DNA testing that matched hairs found on the deceased's body with his own and also matched his DNA to DNA found on the twine used to hogtie her.

[5] The outcome of the trial fell to be decided on contradictory DNA evidence. The expert called by the Crown, Dr. Amarjit Chahal, was of the opinion that the probability that a randomly selected and unrelated person other than the accused being a contributor to the mixed DNA profile from the twine, is one in 50 million. The expert called by the defence, Dr. John Waye, opined that the scientific approach by Dr. Chahal was faulty and that the accused should have been excluded by the DNA evidence. Dr. Waye was unable to do his own testing because all of the degraded DNA samples had been used by Dr. Chahal and his colleagues.

[6] The accused raises ten grounds of appeal with respect to his conviction including an allegation that the verdict was unreasonable. Of the grounds raised, some deal with the admissibility of evidence while others allege errors made by the judge in his instructions to the jury.

[7] In addition, the accused moved a motion seeking to have fresh evidence adduced at this stage in the proceedings, which, if allowed, he argues, should justify the setting aside of his conviction and warrant the holding of a new trial. The fresh evidence is mostly related to the issue of

DNA analysis. For reasons that will become self-evident, I need not rule on this motion. However, I will at the end of my reasons have some *obiter* comments with respect to this motion as well as certain disclosures made by a juror following the sentencing of the accused.

[8] Two additional grounds are raised with respect to the sentence imposed.

[9] For the purposes of these reasons, I will deal only with the following grounds of appeal as the others are not, in my view, sufficiently meritorious to warrant further consideration. The grounds that I will address are: 1) that the verdict was unreasonable; 2) that the judge erred in not providing a *W.(D.)* instruction to the jury (*R. v. W.(D.)*, [1991] 1 S.C.R. 742); 3) that the judge's instructions to the jury did not reflect a proper balance of the evidence led by the Crown and the accused; 4) that the judge failed to deal in his instructions with the concern that the jury might be overwhelmed by DNA profiling evidence; and 5) that the judge erred in not allowing the accused to lead evidence of an incident similar in nature to what occurred in this case and which the accused alleges would have helped exonerate him.

[10] As will be seen, I am not persuaded that the judge erred in how he instructed the jury. While I have concerns about the verdict given the DNA evidence, those concerns do not permit appellate intervention on the basis that the verdict was unreasonable. However, I am of the view that appellate intervention is warranted with respect to the fifth ground articulated above.

Unreasonable Verdict

[11] I deal firstly with the ground of appeal that the verdict was unreasonable because it is such a crucial ground of appeal for the accused, and because it will provide helpful background to explain the nature of this trial. In dealing with this ground, there is no doubt that the DNA evidence linking the accused to the deceased was crucial to his conviction and that, without that evidence, there was no possibility that the Crown could have proven the accused's guilt beyond a reasonable doubt. Not surprisingly therefore, the thrust of the accused's argument with respect to the unreasonableness of the verdict is directed to the unreliability of the DNA evidence generally, but more specifically, to the Crown's main expert, Dr. Chahal. The accused puts into issue his expertise in dealing with degraded DNA, the methods he followed in his analysis and the conclusions that he reached. Counsel for the accused also argues that, in his evidence, Dr. Chahal was unclear, often times unresponsive and generally vague in many of his responses.

[12] The accused further argues that, in the face of the expert DNA evidence that he led, Dr. Chahal's evidence should have been rejected, or at the very least, should have raised legitimate reservations and a reasonable doubt in the minds of the jurors as to its reliability. He argues that there was no reason to reject the evidence of Dr. Waye who opined that Dr. Chahal had simply disregarded evidence that excluded the accused as a donor of the DNA on the twine that bound the deceased.

[13] In other words, the issue at trial was the credibility of the experts.

[14] All of the issues raised by the accused with respect to this ground of appeal must be considered in light of the most recent decision of the Supreme Court of Canada dealing with appellate intervention in cases where the issue of an unreasonable verdict is raised. *R. v. W.H.*, 2013 SCC 22, was released within days of this appeal being heard. Cromwell J., in writing for a unanimous court, set out the issue the court was dealing with in these words (at para. 1):

> A jury found the respondent guilty of sexual assault, but the Court of Appeal concluded that the jury's finding was unreasonable, set it aside and entered an acquittal. The Crown appeals, arguing that the Court of Appeal wrongly substituted its assessment of witness credibility for that of the jury. The appeal therefore raises the issue of an appellate court's role when it assesses the reasonableness of a jury's guilty verdict based on the jury's assessment of witness credibility.

[15] He then stated the following with respect to the standard by which an appeal court is to conduct the review in such situations (at para. 2):

> Of course, a jury's guilty verdict based on the jury's assessment of witness credibility is not immune from appellate review for reasonableness. However, the reviewing court must treat the verdict with great deference. The court must ask itself whether the jury's verdict is supportable on *any* reasonable view of the evidence and whether proper judicial fact-finding applied to the evidence *precludes* the conclusion reached by the jury. Here, the Court of Appeal did not follow this approach. It asked itself instead whether an experienced trial judge could give adequate reasons to explain the finding of guilt and, having answered that question in the negative, found the verdict unreasonable. In my respectful view, the Court of Appeal applied the wrong legal test and reached the wrong conclusion.
>
> [emphasis added]

[16] He then went on to explain more fully the limited role that an appellate court can exercise when reviewing a conviction for reasonableness (at paras. 27-28):

> Appellate review of a jury's verdict of guilt must be conducted within two well-established boundaries. On one hand, the reviewing court must give due weight to the advantages of the jury as the trier of fact who was present throughout the trial and saw and heard the evidence as it unfolded. The reviewing court must not act as a "13th juror" or simply give effect to vague unease or lurking doubt based on its own review of the written record or find that a verdict is unreasonable simply because the reviewing court has a reasonable doubt based on its review of the record.
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> On the other hand, however, the review cannot be limited to assessing the sufficiency of the evidence. A positive answer to the question of whether there is some evidence which, if believed, supports the conviction does not exhaust the role of the reviewing court. Rather, the court is required "to review, analyse and, within the limits of appellate disadvantage, weigh the evidence" (*Biniaris*, [2000 SCC 15, [2000] 1 S.C.R. 381] at para. 36) and consider through the lens of judicial experience, whether "judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). Thus, in deciding whether the verdict is one which a properly instructed jury acting judicially could reasonably have rendered, the reviewing court must ask not only whether there is evidence in the record to support the verdict, but also whether the jury's conclusion conflicts with the bulk of judicial experience: *Biniaris*, at para. 40.
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> [emphasis added]

[17] And in the context of referring to the judgment of McLachlin J. (as she then was) in *R. v. François*, [1994] 2 S.C.R. 827, Cromwell J. wrote (at paras. 32, 34):

….

1. It is for the jury to decide, notwithstanding difficulties with a witness's evidence, how much, if any, of the testimony it accepts. ….

. . . . .

2. Credibility assessment does not depend solely on objective considerations such as inconsistencies or motives for concoction. As McLachlin J. said in *François*, at pp. 836-37:

> [Credibility] turns not only upon such factors as the assessment of the significance of any alleged inconsistencies or motives for concoction, which may be susceptible of reasoned review by a court of appeal, but on the demeanour of the witness and the common sense of the jury, which cannot be assessed by the court of appeal. The latter domain is the "advantage" possessed by the trier of fact, be it judge or jury, which the court of appeal does not possess and which the court of appeal must bear in mind in deciding whether the verdict is unreasonable: *R. v. W. (R.)*, [[1992] 2 S.C.R. 122]. [Emphasis added.]

3. The jury is entitled to decide how much weight to give to factors such as inconsistency and motive to concoct. …. Again in *François*, at p. 837, the Court said this:

> In considering the reasonableness of the jury's verdict, the court of appeal must also keep in mind the fact that the jury may reasonably and lawfully deal with inconsistencies and motive to concoct, in a variety of ways. The jury may reject the witness's evidence in its entirety. Or the jury may accept the witness's explanations for the apparent inconsistencies and the witness's denial that her testimony was provoked by improper pressures or from improper motives. Finally, the jury may accept some of the witness's evidence while rejecting other parts of it; juries are routinely charged that they may accept all of the evidence, some of the evidence, or none of the evidence of each witness. It follows that we cannot infer from the mere presence of contradictory details or motives to concoct that the jury's verdict is unreasonable.

> A verdict of guilty based on such evidence may very well be both reasonable and lawful. [Emphasis added.]
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> 4. To sum up, the reviewing court must be deferential to the collective good judgment and common sense of the jury. As stated in *François*, "the court of appeal reviewing for unreasonableness must keep in mind … that the jury may bring to the difficult business of determining where the truth lies special qualities which appellate courts may not share": p. 837.
>
> Perhaps the most useful articulations of the test for present purposes are those found in *Biniaris* and *Burke* [[1996] 1 S.C.R. 474]. In the former case, Arbour J. put it this way: "… the unreasonableness … of the verdict would be apparent to the legally trained reviewer when, in all the circumstances of a given case, judicial fact-finding precludes the conclusion reached by the jury": para. 39 (emphasis added). In the latter, Sopinka J. concluded that a verdict based on credibility assessment is unreasonable if "the trial court's assessments of credibility cannot be supported on any reasonable view of the evidence": para. 7 (emphasis added). While appellate review for unreasonableness of guilty verdicts is a powerful safeguard against wrongful convictions, it is also one that must be exercised with great deference to the fact-finding role of the jury. Trial by jury must not become trial by appellate court on the written record.

[18] In light of the above, I conclude that the accused cannot succeed on this ground of appeal.

[19] While the accused's arguments dealing with the reliability of Dr. Chahal's evidence and the reasonableness (or lack thereof) of a conviction grounded on that evidence cause me some unease with respect to the verdict, that unease, however, is not enough to establish an unreasonable verdict, according to *W.H.* The jury was well aware of the challenges to Dr. Chahal's evidence, firstly, by listening to his evidence, including a

strenuous cross examination; secondly, from hearing from Dr. Waye; thirdly, by hearing counsel's attack on Dr. Chahal's credibility and the reliability of his conclusions during closing arguments; and, fourthly, by the instructions provided to them by the presiding judge. Notwithstanding, the jurors chose to accept Dr. Chahal's evidence and Dr. Waye's evidence did not raise a reasonable doubt. It was open to the jury to so find. There was evidence, if believed, and it was, on which a properly instructed jury could convict and just because I may view it differently, I cannot conclude that the jury's decision was unreasonable.

[20] In the final analysis, the jury came to a verdict that was open to it and it cannot be said that it was unreasonable.

The Need for a *W.(D)*. Instruction

[21] The next ground of appeal is one that was not specifically plead by the accused, but came about at the court's bidding during the course of argument because of conflicting evidence on a critical issue that was left with the jury. It is whether a *W.(D.)* type of instruction should have been provided to the jury given the fundamental conflict between the expert DNA evidence adduced by both the Crown and the accused, notwithstanding the fact that the accused himself did not testify.

[22] The *W.(D.)* test, as it is often referred to, is the now classic instruction with respect to the rule of reasonable doubt and how it applies to credibility findings that are to be made on conflicting evidence relating to critical issues. It is normally called into play when an accused has testified and the trier of fact is left with an issue of credibility as between the Crown's

witnesses and the accused's denial. In such a circumstance, Cory J. explained in *W.(D.)* how a trier of fact is to proceed (at pp. 757-58):

> In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. ....
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> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > First, if you believe the evidence of the accused, obviously you must acquit.
> >
> > Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
> >
> > Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[23] In the present case, the accused did not testify, but, in his statements which had been allowed into evidence, he denied that he committed the offence. The judge provided the above *W.(D.)* instruction to the jury with respect to those statements, as follows:

> When you review any of the out of court denials made by [the accused], either in the December 10th, 1984 conversation, or in the May 16th, 2007 video statement, it is important that you remember the

> following direction. If you believe [the accused's] denials to the police, you must find him not guilty of the offence charged. Even if you do not believe [the accused's] denials or explanations that he did not kill Candace Derksen, if any part of them leave you with a reasonable doubt about his guilt or about an essential element of the offence charged, you must find him not guilty of the offence charged. Even if any part of [the accused's] denials or explanations to the police do not leave you with a reasonable doubt about his guilt or about an essential element of the offence charged, you may convict him only if the rest of the evidence that you do accept proves his guilt beyond a reasonable doubt.

[24] The key issue, however, still came down to a question of the credibility of the two DNA experts. It is because of this fact that the panel hearing this appeal asked counsel to address the issue of whether a specific *W.(D.)*-type instruction should also have been given to the jury in order to help it in its deliberations with respect to this conflicting evidence.

[25] Before considering whether a specific *W.(D.)* instruction should have been provided, I set out two passages from the judge's charge instructing the jury about reasonable doubt and what must be considered on that issue:

> Insofar as the testimony of Dr. Waye challenges processes, analyses and conclusions of Mr. Hildebrandt and Dr. Chahal, there is obviously a disagreement between the expert opinions. The issue about which these experts differ touches critical evidence which goes to an essential element of the offence charged. It goes to the question of identity and whether or not the DNA evidence will satisfy you that [the accused] was in the shed in question and, more importantly, whether he, [the accused], abandoned the hogtied Candace Derksen and thereby caused Candace Derksen's death. That essential element, which I will explain in more detail later in these instructions, is something the Crown must prove beyond a reasonable doubt before you may find the accused

> guilty. You must not decide this issue simply by feeling that you must choose one expert opinion over the other. Before you accept the opinions of the Crown counsel's experts on this issue you must be satisfied beyond a reasonable doubt that they are correct. If you are not sure that they are correct, then Crown counsel has failed to prove beyond a reasonable doubt the element of identity, or put differently, [the accused's] connection to the unlawful death of Candace Derksen.
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> . . . . .
>
> Now in presenting to you, as I have, the positions of the Crown and the defence one after another or side by side, I wish to caution you against a comparative analysis whereby you simply choose one position that you may prefer over the other. To reason in that [manner] and to come to a verdict as a result of simply choosing between the position of the Crown and the defence is wrong in that it neglects what I have repeated to you throughout my instructions, that is, it is the Crown that has the onus of proving the charge beyond a reasonable doubt. That responsibility never shifts.

[26] The language used in these instructions closely parallels language from Justice David Watt, *Ontario Specimen Jury Instructions (Criminal), 2005 Version*.

[27] The accused argues that the judge effectively shifted the burden of proof to the accused. He argues that the jury should have been told specifically that only if they did not accept his denial and Dr. Waye's evidence should they go on to consider if there was evidence on which to convict. Instead, he argues that the judge incorrectly left it to the jury to choose between his evidence and that led by the Crown, which of course included Dr. Chahal's evidence, and committed the "credibility contest" error that *W.(D.)* guards against (*R. v. J.H.S.*, 2008 SCC 30 at para. 9, [2008]

2 S.C.R. 152).

[28] The Crown, and quite rightly so I find, argues that the judge never instructed or invited the jury to choose which expert they preferred. It further argues that a *W.(D.)* instruction was not required in this case, relying on *R. v. Paul (A.)*, 2009 ONCA 443, 249 O.A.C. 199. However, if such was not the case, it argues that the judge nevertheless covered the essential elements that needed to be covered and did so in an acceptable manner.

[29] *Paul* was a decision of the Ontario Court of Appeal where the accused was charged with first degree murder and the sole issue was one of identity, with DNA evidence being relied upon to prove the identity of the accused. In a *per curiam* decision, the court sets out the submissions of defence counsel as follows (at para. 32):

> Counsel for the appellant made several closely linked submissions concerning the DNA evidence and the burden of proof. Ultimately, we understand him to have argued that the jury should have been told that if it had a reasonable doubt as to whether the appellant could be excluded as the donor of the DNA at any of the sites tested, it must acquit the appellant.

[30] The court then proceeds to reject that argument in these words (at para. 34):

> While the DNA evidence did not stand alone, it was certainly central to the Crown's case. It is fair to say that a jury acting reasonably could not have convicted the appellant without accepting the evidence of the Crown expert. The trial judge's instructions made the importance of the expert DNA evidence crystal clear. There can be no doubt that the jury appreciated the importance of that evidence. We reject the submission that the

> trial judge was obliged as a matter of law to tell the jury that a doubt about one aspect of the testimony given by the expert, as important as that piece of evidence might have been, would necessitate an acquittal. The jury had to assess the totality of the expert's evidence and place it in the context of the rest of the evidence. The burden of proof and the appellant's entitlement to an acquittal if the jury had a reasonable doubt on the totality of the evidence was properly and repeatedly explained to this jury.

[31] Without going into a detailed review of all of the jurisprudence on whether a *W.(D.)* instruction may be required in a case where an accused does not testify, in my view, it is now clear that such an instruction may be required in a wide variety of cases, whether or not the accused testifies. For instance, in *R. v. B.D.*, 2011 ONCA 51, 273 O.A.C. 241, Blair J.A. made the following comments (at paras. 105, 114):

> There is some uncertainty in the jurisprudence, however, about whether the **W.(D.)** requirement extends beyond cases where the accused testifies to those where the accused does not but there is other defence evidence called contradicting the Crown's case and/or conflicting evidence favourable to the defence in the Crown's case (for example, an exculpatory remark in a statement put in by the Crown), and the jury must make credibility findings in that context. This Court has not yet squarely decided that issue. For the reasons that follow, I am satisfied that the principles underlying **W.(D.)** do extend to such circumstances.
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> What I take from a review of all of these authorities is that the principles underlying **W.(D.)** are not confined merely to cases where an accused testifies and his or her evidence conflicts with that of Crown witnesses. They have a broader sweep. Where, on a vital issue, there are credibility findings to be made between conflicting evidence called by the defence or arising out of evidence favourable to the defence in the Crown's case, the trial judge must relate the concept of reasonable doubt to those credibility findings. The trial judge must do so in a way that

> makes it clear to the jurors that it is not necessary for them to believe the defence evidence on that vital issue; rather, it is sufficient if - viewed in the context of all of the evidence - the conflicting evidence leaves them in a state of reasonable doubt as to the accused's guilt: **Challice** [(1979), 45 C.C.C. (2d) 546]. In that event, they must acquit.
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> [emphasis added]

[32] These comments were adopted by the Nova Scotia Court of Appeal in *R. v. J.M.M.*, 2012 NSCA 70, 319 N.S.R. (2d) 73. I, too, adopt them. Also see, *R. v. Ly* (2005), 19 M.V.R. (5th) 183 (Ont. C.A.); and *R. v. Jaw (S.G.)*, 2008 NUCA 2, 432 A.R. 297.

[33] Given the expansive interpretation that courts have given to *W. (D.)*, it is clear that its principles should be applied in cases like this one, involving conflicting expert testimony on a critical issue.

[34] In the present case, I am satisfied that the judge's charge to the jury complied with the principles underlying *W.(D.)*, even though he did not use the wording suggested by Cory J. in *W.(D.)* with respect to the conflicting expert evidence. The jurisprudence is clear that he did not have to do so. By using the language that he did, the judge avoided the credibility contest error identified by Binnie J. in *J.H.S.* and addressed in *W.(D.)* When the charge is read as a whole, it is clear that the judge respected the substance of the *W.(D.)* principles and never placed the jury in the position of choosing between the evidence of the two experts. The judge made it clear that if the jury accepted the evidence of Dr. Waye or if that evidence made them unsure about the evidence of Dr. Chahal, the Crown could not prove its case beyond a reasonable doubt and the accused should be acquitted. He never shifted

the burden away from the Crown.

[35] Accordingly, I would dismiss this ground of appeal.

Lack of Balance in Jury Charge and Overwhelming DNA Evidence

[36] The accused asserts that the judge's instructions to the jury did not reflect a proper balance of the evidence led by the accused and the Crown and that he failed to deal explicitly with the concern that the jury might be overwhelmed by DNA profiling evidence. The accused's major contention with respect to lack of balance is that, when reviewing the evidence for the jury, the judge did not do so in a similar fashion as between the evidence called on behalf of the accused and that called by the Crown. More specifically, the accused alleges that when referring to the evidence of Dr. Chahal, the judge only referred to his evidence in chief and left the impression that the accused's perspective, with respect to Dr. Chahal's evidence, was grounded in the "contention of the defence" rather than evidence.

[37] The accused also strongly argues that the judge failed to sufficiently caution the jury as to the frailties with respect to the DNA evidence that was before it or that he failed to warn the jury of the potential pitfalls in considering and relying on such evidence.

[38] He also alleges that the judge failed to properly put Dr. Waye's evidence before the jury. By not doing so, the accused argues that the judge failed to point out to the jury in a sufficiently forceful and clear manner, the deficiencies and the lack of reliability that should be attributed to

Dr. Chahal's evidence, especially in the face of Dr. Waye's evidence, which he asserts was more accurate, more detailed, more scientifically sound and therefore more credible than that of Dr. Chahal.

[39] The accused also argues that the judge's instructions were not specific enough in explaining how the statistical evidence derived from DNA should or should not be used. He argues that the judge had a duty to insure that the jury was not mesmerized by the DNA evidence it had to sift through, and that he should have provided them with a specific caution as was done in *R. v. Terceira* (1998), 38 O.R. (3d) 175 (C.A.).

[40] The issue in *Terceira* revolved, to a certain degree, around the reliability of what was then novel evidence, DNA. The judge had provided the following instruction to the jury as set out in the Ontario Court of Appeal reasons (at pp. 199-200):

> The DNA tests in this case were conducted soon after the Centre of Forensic Labs opened itself for DNA case work. And there is evidence that challenges the conduct of the DNA tests and evidence that challenges the results. These are reasons for you to take a good close look at the DNA evidence, yourself, all the evidence you've heard from the Crown and the defence, and scrutinize it to see if you consider it reliable as a piece of circumstantial evidence. You have obviously followed it closely, spent a lot of time in court looking at the autorad projections, various aspects of the bands and their measurement and interpretation. You've seen those from both sides. I don't intend to repeat all of that. You have part of it, or small parts of it, anyway, in some of the material in front of you. You followed it very closely. I am confident you will use your common sense, you won't be overwhelmed by any aura of scientific authority advanced by any of the DNA witnesses. The assessment of the evidence really does boil down to a common sense assessment of the evidence, of the various opinions that you have heard, your

assessment.

[41] The accused relies on the following passage from *Terceira*, saying that this is what should have been provided to the jury in the present case (at p. 203):

> At the conclusion of the evidence, the trial judge in his instruction should advise the jury in the normal way as to the limits of the expert evidence and the use to which it can be put. Additionally, in the case of DNA evidence, he or she would be well advised to instruct the jury not to be overwhelmed by the aura of scientific infallibility associated with scientific evidence. The trial judge should tell them to use their common sense in their assessment of the all of the evidence on the DNA issue and determine if it is reliable and valid as a piece of circumstantial evidence.

[42] I disagree with these contentions. The judge provided the jury with an extensive and detailed review of all of the DNA evidence as it was lead, by both the Crown and the accused. He placed squarely before the jury the differences between the evidence and conclusions of Dr. Waye and Dr. Chahal. The judge dealt with DNA evidence in a general manner and then went on to deal with more specific issues that were germane to the issue that the jury had to decide. In my view, the judge dealt with a difficult and complicated matter in a manner that was more than adequate, and managed to render a difficult subject understandable to a non-scientist.

[43] I do not agree with the accused that the instructions lacked balance. In my view, the charge is well balanced, thorough and fair. The accused is correct in alleging that the judge used different words in his review of the evidence, and possibly in setting out the theories of the defence and the

Crown, but, in my view, those are distinctions in style and not substance.

[44] The judge presided over a long, complex and demanding trial and provided the jury with helpful instructions to help them understand the evidence they heard and, in particular, the complexities associated with DNA evidence. The judge provided the jury with a general review of DNA evidence and what use could be made of it and then proceeded to review the evidence of all of the witnesses that provided such evidence. As I have stated earlier in these reasons, in my view, he explained a difficult concept in a manner in which a lay person could relate and understand. The judge provided the jury with a more than adequate charge and the grounds of appeal attacking that charge have not persuaded me that this court should intervene. I would accordingly dismiss them.

Unknown Third-Party Suspect and/or Similar-Fact Evidence

[45] I now move on to the critical issue of the judge's refusal, following a *voir dire*, to allow the accused to adduce evidence of an alleged unknown third-party suspect. The accused contended that some nine months after the deceased was found, there was a strikingly similar event perpetrated on another girl, P.W., at a time when the accused was in custody. The police never arrested a suspect in connection with that event. It was argued before the judge that the *modus operandi* and other physical evidence suggested that the same person abducted both P.W. and Candace Derksen.

[46] The judge set out the parameters of the inquiry before him as follows:

> Okay. And just to be clear for the record, we're now into a voir dire in respect of the question of whether or not the defence should be permitted to either adduce evidence about or refer to details of an investigation involving the alleged complainant in this matter, [P.W.], either under the auspices of the legal principles relating to third party suspect involvement or, as [counsel for the accused] suggested as well, what might be similar act evidence led at the behest of the defence. So that's the, the question before me on this voir dire.
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> To the extent that I've already ruled that third party suspect evidence is evidence that normally has to be, has to be admitted only after some threshold evidence has been demonstrated respecting a link between the third party, known or unknown, and the crime before the court, it was determined that this voir dire would be, amongst other things, for the purposes of having [counsel for the accused] adduce that evidence. It will also be, given what I think is the broader question about whether or not this might also be potentially similar act evidence, an opportunity for me to hear and assess all of that evidence under the rubric.
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> As I understood it, [Crown counsel] insisted that [P.W.] attend as the complainant in the investigation, to give evidence as part of [counsel for the accused's] threshold evidentiary foundation and that's about whom [counsel for the accused] is now making a submission and whom he now intends, I think, to adduce as, as a witness. So with that background and hopefully context, the record will be clear as to what this voir dire is about.

[47] The judge was provided with evidence that suggested that on September 6, 1985, at a time when the accused was in custody, an adolescent by the name of P.W. had been abducted from a Winnipeg street and then found with her hands and feet tied in an empty railway boxcar situated in an area 2.6 kilometers from where Candace Derksen had been located in January 1985. A Wrigley's blue gum wrapper was found at both scenes. The bindings on Candace's wrists were tied with a "Granny Knot" and the

bindings on P.W.'s wrists were described as a "Granny Knot."

[48] There was before the judge, extensive police reports of the incident involving P.W. and of the subsequent intensive investigation. Those reports clearly seemed to indicate that the incident had occurred and that there were similarities between it and how the deceased was murdered. There is even a report of investigators escorting P.W. to Camp Arnes, north of Gimli, Manitoba, where a memorial service for Candace Derksen was being held in the hope that her murderer might be in attendance and might be recognized by P.W. as her abductor.

[49] As well, the judge had before him the statement of a now-deceased person (Ms Wadien) which was submitted for its truth with the consent of the Crown. She was the person who had found P.W. in the boxcar while walking her dog. She provided the following statement to police:

> On Sept. 6/85 at approx. 4:25pm I was walking my dog north bound along the CP railway tracks from Chalmers Av. I was walking along the box cars. I heard someone calling Help Help. I kept walking and I could hear it getting louder. It sounded like somebody was really scared. So I called out where are you. She didn't say anything except help help. I kept going towards the sounds. When I came up beside the box car I could tell it was comming [*sic*] from inside there. I looked inside because the door was open. I saw her propped up against the north end of the box car. She was sitting on her bum with her leggs [*sic*] straight out in front of her with her back against the wall. She was wearing blk shoes suede, blue jeans and it was a brown kangaroo type jacket with the hood over her head. She had a Super Valu plastic bag over her head but it wasn't tied. Her legs were tied at the ankles with a rubber type cord that was wrapped around her ankles once or twice. Her wrists were tied in front of her in the same manner as her ankles. She was crying and sobbing and kept repeating mommie mommie. I untied her and took the bag

> off and she started getting up on her own and I helped her and she was a little unstable walking. I told her it was okay and she was still sobbing and calling for her mom. I helped her down from [t]he car. I asked her where she lived and she said McLeod. I said she was a long way from home. I explained that I lived close by and if she walked with me I'd drive her back. I asked her what her name was and I thought she said [P.] but she was some what incoherent and she was very quiet in speaking and she was sobbing the whole time. We got to my house and she stayed by my car while I ran in to get my car keys. We drove up Gateway and then McLeod. On the way I asked her what the no. was and she told me 1056. She directed me to her place. I stopped at her place on the front street and she said we just passed her brother. We went to her house and when we got to the door she pulled out the keys. I asked her if anyone was home and she said no. I offereed [*sic*] to stay with her but she said her brother would be here shortly. I asked her if she wanted to call police and she said no and thats when her brother showed up. He came in and she ran to him crying and hugged him. I told him what happened. I left them my name and phone no. and left for home. I told my family of the incident and they suggested I call police and I did. I don't know how she became bound or what happened and I did not ask her but her brother asked who had done it and if she knew who it was and she shook her head No.
>
> Signed… Rita Wadien

[50] Finally, the judge heard testimony from P.W. herself.

[51] P.W.'s evidence was problematic for two reasons, which might or might not be related to one another.

[52] Firstly, P.W.'s recollection of the events in 1985 was, to a certain degree, vague and seemed to contradict the statements that she had provided to the police at the time of the incident. She often indicated that she could not remember and that she had dreams and not real memories. When

provided with an opportunity to review her 1985 statement during the course of her testimony, she declined. In her cross-examination, she agreed with a suggestion put to her by the Crown that the 1985 incident had never occurred.

[53] Secondly, P.W. was interviewed at her home by two police officers several days before she was scheduled to testify. It was a lengthy interview. A reading of the transcript of that interview indicates that despite persistent and unrelenting questioning by the police doubting the veracity of her story, she maintained that the abduction had occurred. Indeed, this prolonged and persistent questioning fairly raises the concern that the nature and manner of the inquiry may well have been the cause of her subsequent recantation. Furthermore, on the day that she was to testify, P.W., notwithstanding the fact that she was being called upon to testify by the accused and not the Crown, was brought to the courthouse by the same police officers who had interviewed her previously. When questioned about this, she testified that they gave her no option.

[54] The accused argued before the judge that the "police interference" was cause for the court to be concerned about a wrongful conviction.

[55] In the end, the judge refused to allow the accused to present evidence of what clearly occurred, at least based on the evidence of Rita Wadien and supported by the extensive police reports. He ruled as follows:

> The defence seeks a ruling from the court which would permit it to make reference to and adduce during the course of the trial

> evidence respecting police investigation number 85-4-152909. That investigation arose from an alleged kidnapping in 1985 involving the complainant, as she was then known [P.W.].

The defence contends that such references to evidence from that file should be admissible as evidence of potential third party involvement and/or on the basis of it being properly characterized similar act evidence.

The Crown opposes, submitting that based upon the applicable and governing test as set out in such cases as Grandinetti [2005 SCC 5, [2005] 1 S.C.R. 27], MacMillan [*sic*] [(1975), 7 O.R. (2d) 750 (C.A.)], Handy [2002 SCC 56, [2002] 2 S.C.R. 908] and even Seaboyer [[1991] 2 S.C.R. 577], the evidence is neither relevant nor probative.

On an even more basic level the Crown submits that the defence application cannot get out of the gate given the doubt that the court should have, according to the Crown, as to whether the kidnapping actually took place.

There was a considerable evidentiary foundation adduced on this voir dire, including the entirety of the police report, a statement from a potentially important civilian witness, statements from the alleged complainant, an affidavit from counsel, … about which I look particularly closely at paragraph 4; photographs; and the actual viva voce testimony of [P.W.] ….

I have concluded, after considering all of the evidence on this voir dire, including consideration for their truth the previous statements made by [P.W.], that notwithstanding what the defence argues is the possible involvement of an unknown third party and what the defence submits are certain strikingly similar aspects to the alleged kidnapping of [P.W.], that I am not, even on a balance of probabilities, able to conclude that the alleged offence happened.

Accordingly, pursuant to my role as gatekeeper and the person charged with the responsibility of ensuring the admission of only relevant, probative and admissible evidence, I have determined that there is an absence of sufficient probativeness such that was to justify in an already long and complex trial references to a crime which on a balance of probabilities I repeat I have found

> did not happen.
>
> More specifically, I have determined that the defence not be permitted to make reference to anything from investigation number 85-4-152909 on the basis of the possible involvement of an unknown third party and/or on the basis of the defence arguments respecting similar act evidence.
>
> In that regard, respecting the argument concerning a possible third party suspect, given what I have concluded respecting -- given that I have concluded that the alleged offence set out in investigation 85-4-152909 did not take place, there can be no unknown third party suspect arising from that investigation.
>
> Further, given my determination on a balance of probabilities that the alleged kidnapping did not take place, there could be no useable similarities from that investigation for the purposes of reference by the defence at the trial of the accused ….
>
> In the end any reference to the investigation in question would be insufficiently relevant and insufficiently probative.
>
> The determinations I have made respecting the fact that the allegations in 1984 did not take place are obviously grounded in the testimony, viva voce, that I heard from [P.W.] yesterday. But I made those determinations based upon my reading of all of her previous statements, which I have indicated I have admitted into the voir dire evidentiary foundation, to be considered for their truth.
>
> Given my findings, it is the evidence which … on behalf, on behalf of [the accused], sought to have admitted becomes highly collateral and in the result the defence application cannot be accepted and that application on this voir dire is dismissed.
>
> [emphasis added]

[56] The accused argues that, in denying his application, the judge failed to provide adequate reasons, in the face of what was clearly

contradictory evidence, as to the occurrence of the incident itself. He alleges that the judge chose to give little weight to P.W.'s two statements in which she recounted her abduction and that he seemed to completely ignore the evidence of the extensive investigation the police conducted surrounding the incident, as well as Ms Wadien's uncontradicted statement in which she described finding P.W. in the boxcar in 1985. The accused further argues that the judge's reasons fail to address those facts and further fail to address the law and its application when there are contradictory statements, relying on *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787.

[57] In reply, the Crown addresses this issue as being one of a third-party suspect. It argues firstly, that as the trier of fact in a *voir dire*, the judge was entitled to make the findings that he did and that those findings are entitled to deference from this court. Secondly, the Crown argues that when the judge's reasons are read in the context of the full *voir dire* they are adequate and supportable on the facts.

[58] I find little merit with the accused's argument that the judge's reasons for refusing to admit the evidence are insufficient. In my view, they meet the test that was recently confirmed by the Supreme Court in *R. v. Vuradin*, 2013 SCC 38 (at paras. 12-13):

> Ultimately, appellate courts considering the sufficiency of reasons "should read them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered": *R.E.M.* [2008 SCC 51, [2008] 3 S.C.R. 3], at para. 16. These purposes "are fulfilled if the reasons, read in context, show why the judge decided as he or she did" (para. 17).

> In *R.E.M.*, this Court also explained that a trial judge's failure to explain why he rejected an accused's plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the complainant's evidence and the accused's evidence conflicted, the trial judge accepted the complainant's evidence. No further explanation for rejecting the accused's evidence is required as the convictions themselves raise a reasonable inference that the accused's denial failed to raise a reasonable doubt (see para. 66).

[59] I am, however, concerned with the judge's application of the law in refusing to admit this evidence. The accused wanted to present evidence to the jury that, while he was in custody, a strikingly similar incident had occurred some nine months after the murder of Candace Derksen. The theory of the defence was that the person who had committed the most recent incident was also responsible for her murder.

[60] A trial judge has a gatekeeping role to keep from the jury defences that lack an evidentiary foundation. A threshold test, the "air of reality" test, was developed for this purpose. The seminal case relating to this test is *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3. The basic principles were set out (at para. 51):

> The basic requirement of an evidential foundation for defences gives rise to two well-established principles. First, a trial judge must put to the jury all defences that arise on the facts, whether or not they have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury. …..

[61] Also see the companion cases of *R. v. Pappas*, 2013 SCC 56; and

R. v. Cairney, 2013 SCC 55, for the Supreme Court of Canada's most recent application of *Cinous* and the air of reality test.

[62] The basic features of the accused's evidentiary burden with respect to the air of reality test were conveniently set out by Chartier J.A. (as he then was) in *R. v. Mousseau (E.L.)*, 2007 MBCA 5, 212 Man.R. (2d) 308 (at paras. 15-18):

> With respect to the evidentiary standard applicable to the air of reality test, the court set out the following two-pronged question to determine whether there is an evidentiary foundation warranting that a defence be put to a jury (**Cinous**, at para. 65): Is there "(1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true?"
>
> This analysis requires the trial judge to consider the totality of the evidence and assumes the evidence relied upon by the accused to be true. The evidentiary foundation can be found or inferred from the testimony of any witness, the factual circumstances of the case or from any other evidentiary source on the record: **Cinous**, at para. 53. The trial judge is not to make findings of fact, weigh the evidence, determine credibility or draw factual inferences.
>
> When the record does not disclose direct evidence (evidence which, if believed, resolves a matter in issue: **Cinous**, at para. 88) as to every element of the defence, it must be determined whether the elements in issue can reasonably be inferred from the circumstantial evidence (evidence that tends to prove a factual matter by proving other events or circumstances from which the occurrence of the matter at issue can be reasonably inferred: **Cinous**, at para. 89).
>
> The approach to be followed in the circumstances described in the previous paragraph was discussed in **R. v. Arcuri (G.)**, [2001] 2 S.C.R. 828; 274 N.R. 274; 150 O.A.C. 126; 2001 SCC

> 54, and adopted in **Cinous**, at paras. 90-91. It requires the trial judge in such circumstances to engage in a "limited weighing" (**Arcuri**, at para. 23) to assess whether the evidence, if believed by the jury, could reasonably support the inferences the accused has asked the jury to draw.
>
> [emphasis added]

[63] In a subsequent unanimous decision of the Supreme Court of Canada, *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, the *Cinous* air of reality test of whether there is "(1) evidence (2) upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true" (*Cinous* at para. 65) was confirmed with the added precision that the "evidence" in *Cinous* was "some evidence" or "any evidence" (*Fontaine* at paras. 14, 57). Simply put, if there is any or some evidence which could leave a jury with a reasonable doubt as to the accused's guilt, the accused will have met the required evidentiary burden (Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis Canada Inc., 2009) at para. 5.44).

[64] The question of whether a theory of the defence has an air of reality is a question of law and is to be reviewed on the standard of correctness (see *Cinous* at para. 55; *R. v. Buzizi*, 2013 SCC 27 at para. 15; and *Mousseau* at para. 11).

[65] In this case, the *voir dire* to determine whether the accused had met the threshold test was approached primarily on the basis of the law with respect to third-party suspects and whether the evidence to be adduced by the defence could be similar fact evidence. See *R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27.

[66] In *R. v. Tehrankari (A.)*, 2012 ONCA 718, 298 O.A.C. 252, leave to appeal to S.C.C. denied, [2012] S.C.C.A. No. 547 (QL), Weiler J.A. summarized the applicable law this way (at paras. 35, 37):

> An accused charged with a crime is entitled by way of defence to adduce evidence that a third party, not the accused, committed the crime. The evidence must meet the test of relevancy and must have sufficient probative value to justify its reception. In order to be relevant and probative, the evidence must connect the third person with the crime. If there is an insufficient connection between the third person and the crime, the evidence will lack the requisite air of reality ….
>
> The evidence may be direct or circumstantial. Inferences based on the evidence may be drawn, but speculation is not permitted. The evidentiary burden on the accused is discharged if the defence shows that there is some evidence upon which a reasonable, properly instructed jury could acquit based on the proposed defence ….
>
> [emphasis added]

[67] A review of the judge's reasons, in this case, indicates that he was alive to many of the relevant legal issues. He remained, however, unconvinced on "a balance of probabilities," that the event pertaining to P.W. had even occurred. As a result, he found that "there could be no useable similarities" between the two cases and that this evidence was "insufficiently relevant and insufficiently probative." In reality, he found that the theory of the defence lacked the required air of reality.

[68] With respect, I have difficulty in reconciling the judge's decision to deny the tendering of the evidence on the basis that the incident never occurred in the face of very strong evidence to the contrary. It appears that

he applied the balance-of-probabilities standard when all that was required was the "some evidence" standard. In arriving at his decision, it is clear to me that the judge made factual and credibility findings, conclusions which he was not entitled to make at this point. He appears to rely almost exclusively on the *viva voce* evidence of P.W. to the exclusion of all of the other evidence before him, including P.W.'s two prior statements, that would, in my mind, justify, at minimum, an issue for the jury to decide as to whether she was in fact abducted and left tied in a boxcar in 1985.

[69] The veracity of P.W.'s statements would have to be decided in the context of her prior statements and all the other evidence pertaining to this incident, including the police interview of P.W. just prior to her testimony. It is important to remember the other evidence pertaining to this incident: 1) while the accused was in custody; 2) another adolescent girl (P.W.) had been abducted; 3) she was found, like Candace Derksen, with her hands and feet tied; 4) abandoned in an empty boxcar; 5) in proximity to where Candace Derksen had been found; 6) that a Wrigley's gum wrapper was found at both scenes; and 7) that the bindings on the wrists of both girls were tied with a "Granny Knot."

[70] It seems to me that this evidence, which I view as very relevant, could provide the basis upon which a reasonable, properly instructed jury could acquit, especially given the nature of the evidence called at the trial. It pointed to the possibility that the same person who killed Candace Derksen abducted P.W., if the jury so found that to have occurred. In that event, the accused could not have murdered Candace Derksen given he was in custody at the time of the P.W. incident. This evidence is also relevant in the context

of assessing the expert's evidence, particularly Dr. Waye's evidence excluding the accused.

[71] In the end, in my view, this was relevant evidence upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true.

[72] I must also say that I have two other concerns with respect to the law that was presented by counsel and applied by the judge. First, the law regarding third-party suspects has generally been shaped by cases involving known individuals as opposed to unknown third parties. This is not a case of a known third-party suspect, such as in *Grandinetti*; and *R. v. McMillan* (1975), 7 O.R. (2d) 750, aff'd., [1977] 2 S.C.R. 824) where the defence wishes to adduce character evidence pertaining to a third party. It is more akin to similar-fact evidence and it calls for, in my view, a consideration of the law with respect to such evidence.

[73] Second, the judge, in his ruling, referred to case law that dealt mostly with the test to apply to similar-fact evidence when tendered by the Crown, as opposed to an accused. When the Crown seeks to adduce similar fact evidence against an accused, it has the onus, on a balance of probabilities, to satisfy the judge that the probative value of that evidence outweighs the potential prejudice. See *R. v. Handy*, 2002 SCC 56 at para. 55, [2002] 2 S.C.R. 908. The problem that arises in this case is that the *Handy* test is not the test to apply in those rare situations when the similar-fact evidence is sought to be advanced by an accused. While the judge made a passing reference to *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577, he

did not, in my view, expressly consider the appropriate test that applies when the similar-fact evidence is sought to be adduced by an accused. In such circumstances, the power to exclude evidence is narrower; in other words, the test to be applied is more permissive for the defence than when such evidence is tendered by the Crown. In *Seaboyer*, we find the foundation for that test (at p. 607):

> The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s. 11(*d*) of the *Charter*. It has long been recognized that an essential facet of a fair hearing is the "opportunity adequately to state [one's] case": *Duke v. The Queen*, [1972] S.C.R. 917, at p. 923, dealing with s. 2(*e*) of the *Canadian Bill of Rights*. This applies with particular force to the accused, who may not have the resources of the state at his or her disposal. Thus our courts have traditionally been reluctant to exclude even tenuous defence evidence: David H. Doherty, "'Sparing' the Complainant 'Spoils' the Trial" (1984), 40 C.R. (3d) 55, at p. 58, citing *R. v. Wray*, [1971] S.C.R. 272, and *R. v. Scopelliti* (1981), 34 O.R. (2d) 524 (C.A.). For the same reason, our courts have held that even informer privilege and solicitor-client privilege may yield to the accused's right to defend himself on a criminal charge: *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494; *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.).

[74] McLachlin J. (as she then was) expands on this principle by stating that power to exclude evidence varies depending on whether the admission is sought by the Crown or defence. She then states the appropriate test to apply when the similar-fact evidence is brought forward by the defence: that the relevant evidence is admissible unless its prejudicial effect substantially outweighs its probative value (at pp. 611-12):

> The Canadian cases cited above all pertain to evidence tendered by the Crown against the accused. The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.
>
> These principles and procedures are familiar to all who practise in our criminal courts. They are common sense rules based on basic notions of fairness, and as such properly lie at the heart of our trial process. In short, they form part of the principles of fundamental justice enshrined in s. 7 of the *Charter*. They may be circumscribed in some cases by other rules of evidence, but as will be discussed in more detail below, the circumstances where truly relevant and reliable evidence is excluded are few, particularly where the evidence goes to the defence. In most cases, the exclusion of relevant evidence can be justified on the ground that the potential prejudice to the trial process of admitting the evidence clearly outweighs its value.
>
> [emphasis added]

[75] It is therefore safe to say that when an accused wishes to adduce relevant and admissible evidence, it should be admitted unless its prejudicial effect substantially outweighs its probative value. For instance, in *R. v. Pollock (R.) et al.* (2004), 188 O.A.C. 37, leave to appeal to S.C.C. denied, [2004] S.C.C.A. No. 405 (QL), Rosenberg J.A., writing for the court, observed that "[w]here the accused seeks to admit evidence of the violent disposition of a third party, other than a co-accused, some of the policy reasons for excluding the evidence at the instance of the Crown are attenuated" (at para. 104). He further stated (at para. 110):

> Where the Crown seeks to adduce character evidence of an accused, as with similar fact evidence, the probative value of the evidence must outweigh its prejudicial effect. The balancing is different where one accused seeks to introduce character evidence of a co-accused. The power to exclude relevant evidence adduced by an accused is narrower: **R. v. Seaboyer and Gayme**, [1991] 2 S.C.R. 577; 128 N.R. 81; 48 O.A.C. 81; 66 C.C.C. (3d) 321. It would seem that the evidence is admissible unless its prejudicial effect substantially outweighs its probative value.
>
> [emphasis added]

[76] Furthermore, in an earlier case, *R. v. Kendall and McKay* (1987), 20 O.A.C. 134, Goodman J.A. stated that (at para. 55):

> …. … [T]here does not appear to be any policy reason for preventing an accused from adducing evidence to show the disposition of another person to commit the crime where such evidence is relevant. On the contrary, absent any compelling reason to the contrary, it is essential that as a matter of policy an accused be permitted to adduce by way of defence any relevant evidence unless it is excluded by some evidentiary rule.

[77] To summarize, in order for similar-fact evidence adduced by the Crown to be admitted, its probative value must outweigh its prejudicial effect; conversely, similar-fact evidence adduced by the Crown will only be excluded when its prejudicial effect outweighs its probative value. On the other hand, relevant defence evidence may only be excluded where its prejudicial effect substantially outweighs its probative value.

[78] As already stated, in my view, the evidence sought to be adduced by the defence in this case was relevant evidence. It is trite to say that all

relevant evidence is admissible subject to exclusion on clear grounds of law or policy. I see no legal principle to exclude the evidence at issue here. It was admissible, albeit if perhaps for limited purposes in the case of the evidence that was hearsay. It is left to be decided whether this relevant evidence should be excluded because its prejudicial effect substantially outweighed its probative value. In this case, the only prejudicial effect would be the impact this evidence would have had on the trial process in what was an already complicated and lengthy trial. From his reasons, the judge was obviously concerned about this impact. In my view, that concern did not substantially outweigh the probative value. The accused should have been allowed to place the P.W.-incident evidence before the jury and the jurors would then have had to address its impact on the Crown's burden to prove its case beyond a reasonable doubt. The exclusion of the evidence denied the accused the opportunity of placing before the jury the full answer that he wanted to make. That legal error is sufficient to set aside the verdict and order that a new trial be held.

Fresh Evidence Motion

[79] Because of my finding of error with respect to the similar-fact evidence issue, I need not deal with the motion for fresh evidence with respect to the new DNA evidence, however, for the sake of the fullness of these reasons, I will make some *obiter* comments.

[80] The accused seeks to adduce evidence from Dr. Bruce Budowle, who is the Executive Director of the Institute of Applied Genetics, Vice Chair and Professor in the Department of Forensic and Investigative

Genetics, University of North Texas Health Science Centre. Prior to these appointments, he was employed for 26 years at the Federal Bureau of Investigation's Laboratory Division where he was involved in the research, development, and validation of numerous DNA methods. In an affidavit that he provided in support of the accused's motion, Dr. Budowle deposes that upon review of the case file notes and the evidence heard at trial, he has serious concerns, which he describes as findings of inconsistent and unexplained results, specified interpretation thresholds that may not be valid, inconsistent interpretation practices that would inflate the strength of the evidence, and the most serious of practices which is disregarding potentially exculpatory data.

[81] In addition to Dr. Budowle's affidavit, there is also an affidavit from Dr. Waye who deposes that he failed to alert counsel for the accused of certain issues that are being raised by Dr. Budowle and those issues are further indications of the questionable reliability of Dr. Chahal's evidence.

[82] The test to be met when seeking to have fresh evidence admitted, when such evidence could render unreliable one of the findings of fact material to the verdict, is well established. It was set out by McIntyre J. in *Palmer et al. v. The Queen*, [1980] 1 S.C.R. 759 (at p. 775):

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [[1964] S.C.R. 484].
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[83] With respect to the admission of Dr. Budowle's evidence, the accused argues that the only real issue is the first criteria and further argues that in criminal cases the criteria of due diligence has been applied less strictly than in civil cases. See *R. v. McBirnie (P.S.)* (1992), 59 O.A.C. 1. He also argues based on *R. v. J.A.A.*, 2011 SCC 17, [2011] 1 S.C.R. 628, that the due diligence criterion should not be allowed to trump the other *Palmer* criteria.

[84] In reply, the Crown relies on the principle of finality and the fact that Dr. Budowle's proposed evidence is not new, but simply an attempt to adduce a second opinion "to repeat essentially the same line of attack … pursued at trial through Dr. Waye, that is, that the Crown's expert, Dr. Chahal, misinterpreted the DNA results and should have excluded the [accused] from consideration as a suspect."

[85] With respect to the matter of finality, the Crown refers us to what was recently stated by this very panel in *R. v. Henderson (W.E.)*, 2012 MBCA 93, 284 Man.R. (2d) 164, where Chartier J.A. (as he then was) wrote (at paras. 27-29):

> The second point is with respect to what has been described by McIntyre, J., in **R. v. Palmer**, [1980] 1 S.C.R. 759; 30 N.R. 181,

as the "overriding consideration" in any s. 683 analysis. He made clear that it is "the interests of justice" which shall govern whether the fresh evidence will be admitted (at p. 775):

> Parliament has given the Court of Appeal a broad discretion in s. [683](1)(d). The overriding consideration must be in the words of the enactment "the interests of justice" and it would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice. ...

Those "interests" take in both finality concerns with respect to the trial process and concerns that justice should be done in an individual case (see **R. v. 1275729 Ontario Inc. et al.** (2005), 205 O.A.C. 359 (C.A.), at para. 20). See as well, **R. v. W.R.B.**, [2010] Man.R. (2d) Uned. 69; 2010 MBCA 116 (C.A.), at para. 4, and **R. v. G.D.B.**, [2000] 1 S.C.R. 520; 253 N.R. 201; 261 A.R. 1; 225 W.A.C. 1; 2000 SCC 22, at para. 19, where the Supreme Court of Canada adopted the reasoning of Doherty, J.A., in **R. v. McBirnie (P.S.)** (1992), 59 O.A.C. 1 (C.A.) (at para. 34):

> … The interests of justice referred to in s. 683 of the **Criminal Code** encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. Finality and order are essential to that integrity. The criminal justice system is arranged so that the trial will provide the opportunity to the parties to present their respective cases and the appeal will provide the opportunity to challenge the correctness of what happened at the trial. Section 683(1)(d) of the **Code** recognizes that the appellate function can be expanded in exceptional cases, but it cannot be that the appellate process should be used routinely to augment the trial record. Were it otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal. For this reason, the exceptional nature of the admission of "fresh" evidence on appeal has been stressed:

> **R. v. McMartin**, [[1964] S.C.R. 484] at p. 490 ... [emphasis added]
>
> What can be taken from the above is that the admission of fresh evidence on appeal can be considered, but only in exceptional circumstances. See also, **R. v. Riley (M.W.)** (2011), 303 N.S.R. (2d) 321; 957 A.P.R. 321; 2011 NSCA 52, at para. 19. ….

[86] Finally, on the issue of finality, the Crown points out that Dr. Budowle's evidence could have been obtained prior to trial and that allowing such evidence at this time is simply condoning an exercise in "expert shopping" that should not be encouraged.

[87] The crux of the Crown's argument, however, still remains that Dr. Budowle's evidence is not new, but simply another opinion put forth to challenge the Crown's expert. It argues on that point that the jury heard the evidence of the experts and made a decision and that there is no need or justification in law to revisit it.

[88] Had I needed to, I would have acceded to the Crown's argument and refused to have Dr. Budowle's evidence introduced as fresh evidence. Although it is strong evidence, I have not been convinced that it is anything but a stronger and weightier attack on the Crown's expert and is not in the realm of real "fresh evidence."

[89] The court was also presented with evidence relating to an allegation of an apprehension of bias on the part of a juror. That evidence is contained in an affidavit from Vanessa Lee Gama, who was junior counsel at the accused's trial. She deposes to what a jury member wrote to a journalist following the trial. For context and precision, I refer to the affidavit itself:

2. THAT I have read the book *Journey for Justice: How Project Angel Cracked the Candace Derksen Case*, written by Mike McIntyre after the (Accused) Appellant's trial.

3. THAT at page 323 of this book, Mr. McIntyre recounts a gathering that he attended at the Clifford and Wilma Derksen's, residence following the Appellant's sentencing on May 26, 2011. A number of friends and family members attended the gathering. Of note however, was that three jurors from the trial were also in attendance.

4. THAT I have been informed by Mr. McIntyre and do verily believe that he was in attendance at this gathering. Each of the three jurors spoke at that gathering. At the completion of the gathering, Mr. McIntyre advised the jurors that he was writing a book about the Candace Derksen case and because he had not taken notes at the gathering, he invited any one of the jurors who wished to have their experience published in his book, to forward an email to him with any comments they wished him to include. He advised them that any comments made in this email could be included and published in his book.

5. THAT I have been informed by Mr. McIntyre and do verily believe that shortly there after, he received an email on May 31, 2011 from Wilma Derksen. Ms. Derksen had forwarded the emails of 11 people, who were at the gathering, who wished their comments to be included in Mr. McIntyre's book. One of the emails was from a juror named [D.Z.] who emailed Ms. Derksen, with the explicit understanding that her comments would be forwarded to Mr. McIntyre for inclusion in his book.

6. THAT I have been informed by Mr. McIntyre and do verily believe that the quote Mr. McIntyre attributes to juror number 3, [D.Z.], in his book at page 324, is verbatim account of the email he received from her:

> After the first day of court, walking to my car, I got in my car, burst into tears, called my husband and said, "I don't know if I can do this." Was it going to be like this every

> day, I thought, with the pictures, all of the witnesses, and having to look at that person in the prisoner's box every day that has committed an unspeakable horrific crime. Was I naive in thinking that somehow it would be different? I didn't know. After a week of getting acquainted with my new friends and what felt like was a new way of life, it was getting harder, not easier, as somehow I thought it might. I found my depression creeping back quickly, my anxiety levels heightened and my obsessive and worrisome thoughts were there constantly.

> As the trial continued, I started paying more attention to the people in the gallery. Then it hit me, here I am worrying if I could get through this trial and here was the Derksen family who had lived this horrific nightmare for over 26 years. I felt so silly. A thought overwhelmed me: was there another reason that I'm on this jury, other than to bring justice? Could it be to help me within, to learn to deal with my own issues? I guess I would have to wait and see.

> After the trial was over, I was an emotional wreck. I was so obsessed with reading, listening and watching everything surrounded with the trial over and over again. I just couldn't let it go. Being included and being able to talk with all of you about the trial has definitely helped to bring some closure to this experience. I am absolutely grateful that I was selected and able to help bring justice for your beautiful Candace and for your family. It has been an honour to be able to talk and start to get to know all of you [Emphasis added].

7. THAT I have been informed by Mr. McIntyre and do verily believe that there was an additional line included in the comments of the juror, [D.Z.], which was not included in his book. The juror stated:

> As the trial continued, I started paying more attention to the people in the gallery. Mr. Simmonds was really starting to irritate and annoy me so the distraction of looking at the gallery was good.

[90] Because I have previously come to the conclusion that the appeal should be allowed and the accused granted a new trial, there is no need for me to specifically address the issue of whether the juror's comments amounted to proof of bias sufficient to warrant a new trial. However, without so deciding, I must state that I consider the juror's conduct and the invitation of the journalist to communicate with him to be both unwise and lacking in judgment on both of their parts.

[91] It should, however, be noted that both the juror's and the journalist's conduct may well be in breach of the jury secrecy rule: the member of the jury for disclosing information and the journalist for aiding and abetting the juror.

[92] The following is not in issue:

a) that this member of the jury disclosed to the journalist information pertaining to her own thoughts and considerations with respect to the verdict;

b) that this information was disclosed before the appeal period had expired;

c) that the journalist published this information prior to the appeal period had expired; and

d) that, as a result of the above, the accused used that information as the basis for a ground to impeach the verdict.

[93] The right to the benefit of a trial by an independent and impartial jury is guaranteed by ss. 1(d) and (f) of the *Canadian Charter of Rights and Freedoms*. This independence is further strengthened by protecting the jury decision-making process in the *Criminal Code*. Section 649 of the *Code* makes it an offence for a jury to disclose "any information relating to the proceedings of the jury when it was absent from the courtroom." This is commonly referred to as the jury secrecy rule. This section does provide exceptions, but none are applicable here. Finally, s. 49 of *The Jury Act*, C.C.S.M., c. J30 states the following:

> **Non-disclosure of jury discussions**
> **49** Every person who, having been a member of a jury that has rendered its verdict or been discharged, discloses or discusses in any way the nature or content of any discussions held by the jury on which he or she served is guilty of an offence and liable, on summary conviction, to a fine of not more than $1,000. or to imprisonment for not more than one month or to both such fine and such imprisonment.

[94] While there is not a lot of jurisprudence on what is meant by "any information relating to the proceedings of the jury," the Supreme Court of Canada has said the following:

a) That the thought processes of individual jury members about their personal or collective considerations after a verdict has been given are clearly caught by the jury secrecy rule. See the seminal case on jury

secrecy, *R. v. Pan*; *R. v. Sawyer*, 2001 SCC 42, [2001] 2 S.C.R. 344, where Arbour J. wrote (at para. 75):

> It is not uncommon for jurors to have second thoughts, after the trial is over, as to whether or not they should have delivered the verdict that they did. At that point they may come forward and state that they did not agree with the verdict delivered by the jury, although they expressed their agreement at the time the verdict was delivered. These second thoughts may result from information obtained following the conclusion of the trial, such as exposure to evidence excluded during the course of the trial, or they may arise from a juror's own thought processes. Whatever the origins of these second thoughts, they should fall squarely within the common law rule of jury secrecy and should not be admissible to impeach the verdict.
>
> [emphasis added]

b) That members of the jury cannot be questioned after the trial (see *R. v. Sarrazin*, 2011 SCC 54 at para. 22, [2011] 3 S.C.R. 505). While the restriction against eliciting information from a jury was not specifically considered in the context of s. 649, it was stated in the context of reviewing the rules governing the curative proviso (s. 686(1)(*b*)(iii) of the *Code*) and an appellate court's "somewhat speculative" assessment of a jury verdict under that section (*ibid.*):

> …. This assessment is necessarily somewhat speculative, as no one really knows what the *actual* jury would have done if its members had been properly presented with all of the verdicts that might reasonably have arisen on the evidence. Of course, no one *can* know, since members of the jury cannot be questioned after the trial.
>
> [emphasis added]

[95] In the end, once the appeal process will have run its course, and all issues conclusively determined, it will have to be decided whether or not the conduct of this member of the jury and the journalist in question was contemptuous, a breach of a duty to respect the jury secrecy rule or an offence under *The Jury Act.* It would not be appropriate to say more, as the issue was not fully before this court.

Conclusion

[96] I would allow the accused's conviction appeal and order a new trial. As a result, I need not deal with the sentence appeal.

_____ J.A.

I agree: _____ C.J.M.

I agree: _____ J.A.